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DISCUSSION OF SENATOR WHITEHEAD'S PAPER ON THE IMPROVEMENT AND REVISION OF STATUTE LAW

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One needs only to make a cursory survey of the periodical literature, treatises on government and politics, and the reports of proceedings of numerous societies of lawyers and jurists to be thoroughly impressed that there is a widespread conviction, based no doubt upon abundant evidence, that the average popular legislative assembly, if not corrupt and venal, is inherently weak and incompetent, and to this incompetency, plus some corrupt and sinister purposes, may be charged most of the ills we suffer from an incongruous and incomprehensible mass of statute law. The legislative department, the source of all our statute law, has from the beginning been under suspicion and criticism. Our constitutional limitations have been aimed for the most part at the legislative branch, and the bulk of criticism points the same way. We have been, and still are, afflicted with overlegislation and with bad legislation. The annual output of the American legislatures, we are told, is 15,000 laws covering 25,000 pages; from 1899 to 1904 the total number of acts passed by American legislatures was 45,552 while during substantially the same period, the English parliament, legislating for 42,000,000 of home population and millions of dependents, enacted less than 1500 laws, special and general. That the laws are of doubtful quality is indicated by the fact that in New York alone during a period of about twenty years over 500 statutes were challenged in the courts for unconstitutionality, and the amount of litigation due to uncertainty in the statute law passes computation.

The evil is admitted. The need of improvement and revision of our statute law is apparent. The problem of the remedy, however, is not so clear. The evil is due to no one cause nor is the remedy to be found in any one direction. The difficulty lies partly in our political system, in the strict separation of governmental powers, in our failure to recognize the distinction between local and general legislation and properly apportioning the work of law making on such basis;

partly in the procedure and methods of legislative assemblies; partly in the character and capacity of the members of the law-making body. The remedy lies partly in certain important changes in our political system, in our methods of legislative procedure, in the improvement of the character and capacity of the legislators.

Without attempting, however, to point out all the possible causes of the present evils, or to suggest all the possible remedies, I wish merely to state several propositions which if duly taken into account would produce great improvement: The framing of clear, comprehensive, and effective legislation is a most difficult and arduous work, requiring the highest order of intellectual equipment and ability. If to interpret and administer laws when made requires the entire time and energy of a highly trained and experienced judiciary, much more does the framing of laws require experts of the highest skill and widest experience. He who gives the law ought to be at least of equal capacity with the interpreter and administrator of the law. That this is true theoretically, no one will question. Our practice, however, is just the contrary. Legislation is too often the work of the non-expert and inexperienced.

While it is often said that hysteria, blackmail, partisanship, personal ambition, and selfish interests add ten new laws to our statute books where only one is needed, it is not true that the present conditions are due in any large measure to these factors. It is the incompetency of the legislator, due to lack of knowledge and experience, which produces much of our present unsatisfactory condition. This cause, plus the irrational and absurd method under which legislators are required to work, could hardly be expected to produce anything but chaos and confusion. Unfortunately our whole scheme of choosing legislators seems inevitably to produce the unqualified law maker. While it may not be possible under our present system to produce an ideal legislature composed of men expert in the knowledge of jurisprudence and skilled in the drafting of laws, it is possible to clearly improve the average legislator by giving him an opportunity to acquire knowledge by experience, to bring to his aid the service of experts, and to create rational conditions under which his work may be done. The terms of office fixed by most of our State constitutions are entirely too short, and this limitation, coupled with the pernicious tradition of rotation in office, prevents any continuity of legislative service. No sooner does a man get into the legislature and begin to learn something of the work of law making, than he is pushed aside

in order that the next novice may have his turn. Then again the sessions of the legislature are so limited as to time and length of meeting as seriously to interfere with deliberation. In the face of all the criticism now being heaped upon legislative bodies, it may seem hazardous to suggest longer or more frequent sessions of legislatures, but I am not advocating more sessions or longer sessions, but a better distribution of the sessions or sittings of the legislature. One of the favorite constitutional methods of restraining the legislature is to keep it out of session by limitations as to time and length of meeting, and by forbidding compensation for extra sessions, but the cure for overlegislation and bad legislation is not to make it intermittent. It is a total misconception of the legislative function to suppose that it can be effectively performed by a group of men, for the most part inexperienced, coming together once every two years for from forty to ninety days and then returning to their homes. No one would expect the judicial or executive functions to be performed in that way.

Law making is a continuous business and the work of the legislator should likewise be continuous. Why should we have fixed sessions? Why should not legislators hold office for a sufficiently long time to gain some wisdom, and why should not the legislature meet from time to time for the due deliberation of proposed laws? This would not necessitate more days of legislative session, but a more rational distribution of the sessions. Nothing would seem more irrational than our present practice of crowding into one prolonged session of a fixed number of days all the law making for two or more years, and the deferring until the closing days of such session enactments both trivial and momentous, and then with shameful haste, some scandal, and little scrutiny pushing the whole mass through together. If the legislature met at stated intervals, and its sessions were regarded as continuous, it would be possible to apply to the making of the general statutes some of the care and deliberation which is expended in amending or changing our written constitutions, as for example requiring a proposed amendment to stand over one or two sittings of the legislature. Aside from certain curative and remedial statutes, appropriations, and administrative acts, there is little law making that requires haste. If a proposed law had to stand over for several sittings of the legislature, there would be some assurance that it would be properly framed with reference to existing laws, that there was some strong need for it, and that when finally passed, it would represent the best efforts of the law makers in that direction.

Such an arrangement would also make it possible to develop some coherent plan or program of legislation, instead of the present hit and miss fashion of introducing bills. It would also give more opportunity for the use of expert draftsmen and for the work of committees and commissions. Some of the best legislation to be found in our books has been the result of the investigations and deliberations of committees, composed in part of members of the legislature, and in part of specially qualified experts, sitting for long periods during the intervals between legislative sessions. No important piece of general legislation should ever be undertaken without extended consideration by such a commission, in order that the proposed laws in all their bearings might be adequately understood and considered. It is notorious that our legislators are given to patch work and piecemeal law making, to the dovetailing of new legislation into existing laws without adequate consideration of the effect of the amended statute on related subjects. These and many other defects would be largely diminished if the opportunities for deliberation and study were made possible. While the representative law-making body may be still on trial, and grave doubts may be entertained as to whether it is a necessary or efficient part of our political system, it is only fair that in its trial the conditions be made more favorable for deliberation and care. To this end, therefore, we should seek to secure a long and continuous service for the legislator, and conditions of meeting somewhat akin at least to those under which other deliberative assemblies perform their functions.